UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GARY G. PAPRITZ, appellant, v. DEPARTMENT OF JUSTICE, agency.	DOCKET NUMBER DC04328510382 Date: SEP 02 1986

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

OPINION AND ORDER

The appellant was removed from his position as a GS-13 Management Analyst in the agency's Facilities and Property Management Branch based on a charge of unacceptable performance in two critical elements of his position. A presiding official of the Board's Washington, D.C., Regional Office sustained the appellant's removal, and the appellant has petitioned the Board for review of the presiding official's initial decision. For the reasons stated below, the Board hereby DENIES the appellant's petition, but REOPENS the appeal and AFFIRMS the initial decision as MODIFIED herein. *See* 5 C.F.R. § 1201.117.

Background

On January 4, 1985, the appellant's second-level supervisor issued the appellant a letter of warning informing him of his unsatisfactory performance. Regional Office File, Tab 3-5. The letter further advised the appellant that he was being placed on a 60-day performance improvement period and that during that period he was to work on two assignments, one of which dealt with developing a voice telecommunications system, and the other of which

dealt with proposing a budget for the system. Regional Office File, Tab 3-5. On the last day of the performance improvement period, March 4, 1985, the appellant's immediate supervisor assigned him an additional project which entailed developing the agency's Civil Division Housing Plan. Regional Office File, Tab 3-6. On March 13, the second-level supervisor informed the appellant that the two original assignments had been satisfactorily completed, but that, "because they were joint efforts including the participation of other staff members," they did not provide an adequate basis for evaluating his individual performance. Regional Office File, Tab 3-7. The appellant was advised that his performance improvement period was being extended, that his work on the housing plan was due March 22, and that his performance would "be reevaluated at that time." *Id.* The appellant's subsequent removal was based partly on his failure to satisfactorily complete the March 4, 1985, assignment, and partly on his performance before the performance improvement period began. Regional Office File, Tabs 3-10 and 3-13.[1]

Analysis

The appellant alleges that the agency violated his rights under 5 U.S.C. § 4302(b)(2) by failing to communicate to him the performance standards he was required to meet in order to be retained.

An agency is required to communicate to its employees, at the beginning of each appraisal period, the performance standards and critical elements of their positions. 5 U.S.C. § 4302(b)(2). When an appellant contends that an agency violated this requirement, the agency must prove by substantial evidence that the appellant was made aware of and understood the performance standards and critical

---

[1] The agency found that the appellant had failed to meet the performance standards for those critical elements of his position that concerned surveying the space requirements of his division and communicating orally and in writing.

elements in question at the beginning of the appraisal period that forms the basis of the adverse action. *Cross v. Department of the Air Force*, 25 M.S.P.R. 353, 357 (1984). Communication of those standards may occur in the performance improvement period, in counseling sessions held with the appellant, in written instructions, or "in any manner calculated to apprise the employee of the requirements against which he is to be measured." *See Donaldson v. Department of Labor*, 27 M.S.P.R. 293, 298 (1985).

In the instant case the record reveals that the appellant was made aware of the substance of his critical elements upon joining the agency in June of 1984. Hearing Transcript, vol. 1 at 63-64. He also received a position description that further informed him of his duties and responsibilities. Regional Office File, Tab 3-3; Hearing Transcript, vol. 1 at 58. Subsequently he received specific instructions regarding his performance standards as well as agency expectations concerning his assigned projects, Hearing Transcript, vol. 1 at 200-201, and he readily admitted that, based upon his previous experience as a Management Analyst and his receipt of his position description, he was aware of what the duties of his position entailed, Hearing Transcript, vol. 2 at 17, 50 and 52. Further, the appellant received counseling concerning his performance deficiencies before the performance improvement period began. Hearing Transcript, vol. 1 at 67-68 and 200-203. We find therefore that the appellant was aware of and understood the standards against which his performance was to be measured and that the agency met its burden of proof on this issue. *See Cross*, 25 M.S.P.R. at 357; *Donaldson*, 27 M.S.P.R. at 298.

The appellant argues next that he was not provided with a reasonable opportunity to demonstrate acceptable performance.

An agency may remove an employee for unacceptable performance, but only after providing the employee an opportunity to demonstrate acceptable performance. 5 U.S.C. § 4302 (b)(6).[2] The appellant alleges that the agency violated this requirement in two ways: (1) Its extension of the performance improvement period in effect required the appellant to complete a second performance improvement period after he had satisfactorily completed the first, and (2) the second performance improvement period was too short to afford him a reasonable opportunity to demonstrate acceptable performance.

As we stated above, the appellant's performance improvement period was extended for 30 days after the agency advised the appellant that his work during the first 60 days of that period did not provide an adequate basis for evaluating his performance. The appellant argues that under the Board's holding in *Frish* v. *Veterans Administration*, 24 M.S.P.R. 610, 614 (1984), his performance improvement period should not have been extended "since the work he was assigned during that period was completed satisfactorily." We find, however, that this case differs from *Frish* in two important respects. First, the performance of the appellant in *Frish* was rated minimally satisfactory before his performance improvement period was extended, while the agency in the case now before the Board did not provide any such rating. Second, we find that the agency's extension of the appellant's opportunity period was warranted. The testimonial evidence indicates that, due to unexpected technical problems and budgetary constraints, the appellant was unable to perform the work he had been assigned. Hearing Transcript, vol. 1 at 120-30. The agency therefore was unable to evaluate the appellant's performance during

---

[2] At 5 C.F.R. § 432.202, this opportunity to demonstrate acceptable performance is defined as a "chance for the employee to show that he or she can meet established minimum performance standards for the critical elements of the job."

the initial performance improvement period. *Id.* at 128. Because there was no basis upon which the agency could properly evaluate the appellant's performance during the 60-day rating period, and because the agency was not aware of the circumstances that would interfere with this evaluation at the time it established the original 60-day period, the agency was justified in extending the opportunity period. *Cf. Frish,* 24 M.S.P.R. at 614 (agency's stated reasons for extending performance improvement period not sufficient because agency knew of those circumstances at the time it initially set that period).

The appellant further argues that the extended opportunity period was too short to provide him a reasonable opportunity to improve. We disagree. Even if, as the appellant alleges, he was not allowed all the additional time by which the agency extended the period (i.e., 30 days), there is no evidence in the record that the length of time the appellant was allowed unfairly prevented him from demonstrating acceptable performance. To the contrary, the record shows that the appellant submitted his initial draft at least one day early and that, despite being informed that his performance would be evaluated on the basis of this particular project, he failed to request additional time in which to correct the deficiencies before submitting his final draft.

Finally, the appellant argues that his supervisor, who was a black man, suffered no adverse action even though he reviewed and approved the appellant's work; that he therefore has established a *prima facie* case of discrimination; and that the agency failed to rebut the inference of discrimination. We do not agree. Even if the appellant could be said to have presented a *prima facie* case of discrimination, the agency has rebutted any inference of discrimination by showing that the appellant's supervisor was counseled repeatedly regarding his "leniency as a supervisor," Hearing Transcript, vol. 1 at 203; that he was

told that he would receive an unsatisfactory rating on the supervisory element of his position, *id.* at 205, 211; that his appraisal was postponed because he was actively looking for another job, *id.* at 210-11; and that he was not demoted because he left the agency, *id.* at 211. Accordingly, we concur in the presiding official's conclusion that the appellant failed to substantiate his allegation of racial discrimination.

Decision

The initial decision of September 24, 1985, is hereby AFFIRMED, as MODIFIED herein and the appellant's removal is SUSTAINED. This is the final order of the Merit Systems Protection Board in this appeal. *See* 5 C.F.R. § 1201.113(b).

The appellant has the statutory right under 5 U.S.C. § 7702(b)(1) to petition the Equal Employment Opportunity Commission (EEOC) for consideration of the Board's final decision with respect to claims of prohibited discrimination. The statute requires at 5 U.S.C. § 7702(b)(1) that such a petition be filed with the EEOC within thirty (30) days after notice of this decision.

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under 5 U.S.C. § 7703(b)(2) to file a civil action in an appropriate United States District Court with respect to such prohibited discrimination claims. The statute requires at 5 U.S.C. § 7703(b)(2) that such a civil action be filed in a United States District Court not later than thirty (30) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, the appellant has the statutory right under 42 U.S.C. § 2000e5(f) - (k), and 29 U.S.C. § 794a, to request representation by a court-appointed lawyer, and to request waiver of any requirement of prepayment of fees, costs, or other security.

waiver of any requirement of prepayment of fees, costs, or other security.

If the appellant chooses not to pursue the discrimination issue before the EEOC or a United States District Court, the appellant has the statutory right under 5 U.S.C. § 7703(b)(1) to seek judicial review, if the Court has jurisdiction, of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The statute requires at 5 U.S.C. § 7703(b)(1) that a petition for such judicial review be received by the Court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C